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No. 99-2001

Supreme Court, U.S.
FILED
JUL 12 2000
CLERK

IN THE

Supreme Court of the United States

JOHN DEW,

Petitioner,

—v.—

HEALTH INSURANCE PLAN OF GREATER NEW YORK and ANTHONY WATSON, Individually and as President of HIP,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Should the Petition be granted in this garden-variety discrimination case to review a summary order by the Court of Appeals for the Second Circuit which applied the traditional burden-shifting analysis in affirming the District Court's grant of summary judgment?

2. Should the Petition be granted to consider whether 42 U.S.C. 1981 applies to at-will employees, notwithstanding the fact that the Second Circuit expressly declined to decide the issue in this case and has subsequently joined the Fourth, Fifth, and Tenth Circuits in finding that it does?

3. Should the Petition be granted to consider whether the Second Circuit misapplied well-settled principles of law to the particular facts presented here, or whether it made erroneous factual findings?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents certify that: (i) HIP Foundation, Inc., is the parent corporation of Health Insurance Plan of Greater New York; and (ii) there are no publicly-held companies that own the stock of Health Insurance Plan of Greater New York.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Health Insurance Plan of Greater New York ("HIP") and Anthony Watson respectfully request that this Court deny the Petition for a Writ of Certiorari to review the unpublished opinion of the United States Court of Appeals for the Second Circuit, reported at 208 F.3d 202 (2d Cir. 2000) (table); 2000 WL 282488 (2d Cir. 2000).

There is no reason for this Court to grant the Petition in this garden-variety discrimination case. No novel legal issues are presented here, nor does the Court of Appeals' decision create a conflict among the Circuits.

The Second Circuit's unpublished opinion did nothing more than apply familiar legal principles to the particular facts of this case. Moreover, because there is no precedential impact to the unreported decision below, it can have no effect on the outcome of other cases.

COUNTER-STATEMENT OF THE CASE

A. Statement of Undisputed Facts

HIP is a not-for-profit licensed health maintenance organization and insurer which contracts with several independent medical groups to provide primary medical care for its insureds. JA 126.[1]

Petitioner, John Dew ("Dew") is an African-American male hired by HIP in late 1995 to be the Corporate Liason in HIP's Medical Department. Pet. at 3, A3. "Corporate Liason" was a new position at HIP, created for Dew following his termination from Brooklyn Medical Group, one of the independent medical groups with which HIP contracted. JA 84, 106.

In 1997, HIP decided to cut costs by implementing a management reduction in force ("RIF"). Accordingly, each department was asked to identify non-essential positions that could be eliminated. The Medical Department chose Dew's newly-created Corporate Liason position for the RIF. JA 53-54, 85-89.

On February 6, 1997, Dew and 28 other management employees whose positions were eliminated were laid off. JA 117. Seven of the 29 employees terminated as part of this RIF (24%) were African American, as compared to the 40% composition of African-Americans in

[1] The Joint Appendix filed in the Court of Appeals is referenced herein as "JA" [page number]. Citations to the Petition appear herein as "Pet." at [page number].

HIP's overall workforce. Moreover, Dew was the only African-American among the three terminated employees at Dew's Director level or higher. Five remaining Directors, as well as respondent Anthony Watson, the Chairman of the Board Chief Executive Officer of HIP, are African-American. JA 117-18, 127.

Upon his termination, Dew was provided with severance in accordance with the formula set forth in HIP's Personnel Policy Manual. JA 119-20.

Following his termination, Dew initiated the underlying race discrimination action against HIP and Watson. Specifically, Dew alleged that he was discriminated against in violation of 42 USC § 1981 in his selection for the RIF as well as in the amount of his severance payment, in addition to various state law claims.

B. The District Court Opinion

The District Court (Glasser, J.) issued an unpublished Memorandum and Order dated July 15, 1999, by which it granted summary judgment dismissing Dew's complaint in its entirety. (The District Court's opinion is annexed to the Petition at A13-A38). After setting forth the well-settled summary judgment standard, the District Court applied the familiar tripartite burden-shifting analysis articulated by this Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). Pet. at A25. Upon careful consideration of the evidence proffered by Dew to support his discriminatory discharge claim, the District Court determined that Dew failed to meet even the minimal burden of establishing a *prima facie* case of discrimination. Additionally, the District Court concluded that, even assuming a *prima facie* case had been shown, Dew failed to rebut the non-discriminatory reason proffered by HIP; namely, the management RIF. Pet. at A31.

Similarly, the District Court concluded that Dew failed to produce any evidence suggesting that his race played any role in applying the formula set forth in HIP's employment manual in calculating Dew's severance upon his termination. Pet. at A36.

Finally, having dismissed Dew's federal claims, the District Court declined to exercise its discretionary jurisdiction over Dew's state law claims. Pet. at A37.

C. The Second Circuit Opinion

Upon Dew's appeal and following a *de novo* review of the District Court's grant of summary judgment, the Second Circuit unanimously concluded that Dew failed to demonstrate any factual issues to be tried and, accordingly, affirmed the decision of the District Court in an unpublished summary order. (The Second Circuit's summary order is annexed to the Petition at A1-A12). Noting that HIP had articulated a non-discriminatory reason for Dew's discharge and that Dew failed to put forth evidence of pretext, the Second Circuit concluded that it did not need to decide whether Dew's evidence also failed to make out a *prima facie* case. Specifically, the Second Circuit determined that the isolated stray remark and the selective statistical evidence relied on by Dew were insufficient to permit a rational jury to find in his favor on his discriminatory discharge claim. Pet. at A10-A11.

The Circuit Court also concluded that Dew failed to identify any other non-minority employees terminated as part of a RIF who received severance according to a different formula from the one applied to Dew. Accordingly, the Court concluded that Dew failed to sustain his burden of establishing a *prima facie* case of disparate treatment with respect to his severance. Pet. at A11.

Finally, finding no abuse of discretion in the District Court's refusal to exercise jurisdiction over Dew's state law claims, the Second Circuit affirmed the District Court's grant of summary judgment in its entirety. Pet. at A11-A12.

REASONS FOR DENYING THE WRIT

This case lacks any compelling reason warranting this Court's review. *See* Sup. Ct. R. 10. The Second Circuit's unpublished unanimous opinion follows the settled law of this Court and presents no inconsistency with other Circuits and no novel legal issues requiring this Court's consideration.

I.

THE WRIT SHOULD BE DENIED BECAUSE THE OPINION BELOW DOES NO MORE THAN APPLY THE WELL-SETTLED BURDEN-SHIFTING ANALYSIS APPLICABLE IN DISCRIMINATION CASES

A. The Second Circuit's Opinion Is Based Soundly On The *McDonnell-Douglas* Burden Shifting Analysis

Contrary to Petitioner's claim that the Second Circuit has "articulated a new standard for considering a plaintiff's claim of race discrimination" (Pet. at 8), the Second Circuit's decision is based on a careful analysis of the facts under the familiar *McDonnell-Douglas* standard.

Dew's attempt to cast the Second Circuit's opinion as a departure from settled jurisprudential principles is either disingenuous or based on a misreading of that opinion. Dew erroneously contends that the Second Cir-

cuit "ignor[ed] the multi-stage test articulated in *McDonnell-Douglas* and simply assessed whether Dew's evidence, on the whole, was sufficient to survive summary judgment." Pet. at 8.[2] To the contrary, the Court expressly laid out the applicable three-part burden-shifting test and assessed the evidence in the record against that standard. *Id.* at A8-A10. Fully cognizant of the tripartite standard, the Court reasoned that:

> since HIP came forward with a legitimate, nondiscriminatory reason for his termination, namely, [ ] the RIF, and since Dew failed to introduce evidence from which a reasonable jury could conclude that, in Dew's case, the RIF was merely a pretext for racial discrimination, we need not decide whether Dew made out a prima facie case.

Id. at A10. The fact that the Second Circuit did not determine whether the insufficiency of Dew's evidence also constituted a failure at the *prima facie* stage does not amount to "re-wr[iting] this Court's jurisprudence." *Id.* at 11. If it did, numerous other courts spanning the Circuits have also "re-written" the relevant standard in assessing whether summary judgment was appropriate in discrimination cases.[3] Indeed, this Court

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[2] Even if the Second Circuit had simply assessed whether Dew's evidence on the whole was sufficient to survive summary judgment(which it did not), Dew would nevertheless not be entitled to relief in light of the Court's determination that his proffered evidence was wholly insufficient to sustain his claims.

[3] *See, e.g., Brennan v. Metropolitan Opera Assoc., Inc.*, 192 F.3d 310, 317 (2d Cir. 1999) ("we need not decide the issue, however, because even if appellant succeeded at the prima facie stage summary judgment was still properly granted"); *Ransom v. CSC Consulting, Inc.*, __ F.3d __, 2000 WL 772873, at * 3 (7th Cir. 2000) ("[w]e will bypass the prima facie case . . . because, as discussed below, CSC has presented evidence of a legitimate non-discriminatory reason for Ransom's termination, and there is no evidence of pretext"); *Connor v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1395 (10th Cir. 1997)

has expressly rejected the type of mechanical application of *McDonnell-Douglas* urged by Petitioner here. *See United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) ("[t]he prima facie case method established in McDonnell-Douglas was 'never intended to be rigid, mechanized or ritualistic' ") (citation omitted).

Thus, far from "collapsing" or "confounding" the traditional burden-shifting analysis (Pet. at 7, 10), the Second Circuit applied that analysis to the facts presented in this case without exception or limitation. At most then, the Petition takes issue with the *result* reached by the Second Circuit upon its application of those familiar legal principles. *See, e.g.*, Pet. at 7 ("summary judgment should not have been granted and this Court should intervene to correct the Court of Appeals' erroneous *application* of summary judgment procedures . . .") (emphasis added). However, even if the Second Circuit had misapplied the *McDonnell-Douglas* analysis to the facts of this case, that still would not warrant this Court's extraordinary review. *See* Sup. Ct. R. 10 ("[a] petition for a Writ is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law").

B. The Other Claimed Evidentiary Errors Are Without Merit And Are Not Grounds For Granting The Writ

The other claimed errors identified by Petitioner in support of the Writ are equally without merit. Essentially, Petitioner contends that the Court of Appeals overlooked certain evidentiary issues which, accord-

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("[w]hether there are sufficient other circumstances to sustain Connor's burden of proving . . . his prima facie case we need not decide because the district court opinion can be affirmed on the basis of its holding at the next stage of the McDonnell-Douglas analysis . . .").

ing to Petitioner, would have precluded summary judgment.

Initially, Petitioner relies on an isolated racial remark about Indians made by Dew's supervisor. *See* Pet. 14-15.[4] Contrary to Petitioner's suggestion, however, the Second Circuit correctly applied settled legal principles in its determination that this remark—not concerning African-Americans and not made in the context of Dew's discharge—was insufficient to defeat summary judgment. *See, e.g., Spence v. Maryland Cas. Co.*, 803 F.Supp. 649 (W.D.N.Y. 1992), *aff'd.* 995 F.2d 1147 (2d Cir. 1993) ("stray remarks are 'insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements are made by the decision-maker in issue' ") (citations omitted).[5]

Petitioner's second claimed evidentiary oversight fares no better. Petitioner suggests that the Second Circuit failed to consider evidence that other former HIP employees received greater severance upon their termi-

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[4] The Petition seems to contend that this stray remark only establishes Dew's *prima facie* case. *See* Pet. at 15. Even if this were true, it would not fulfill his ultimate *McDonnell-Douglas* burden of rebutting HIP's non-discriminatory reason for his termination.

[5] Petitioner suggests that summary judgment is inappropriate in the vast majority of discrimination cases, because intent is at issue. *See* Pet. at 15-16. However, the opinion below is entirely consistent with the Second Circuit's affirmance of summary judgment notwithstanding the fact that intent may be in issue, where insufficient evidence of discriminatory intent is produced. *See, e.g., Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985) (the "salutary purposes of summary judgment . . . apply no less to discrimination cases than to commercial or other areas of litigation"); *McLee v. Chrysler Corp.*, 38 F.3d 67, 68 (2d Cir. 1994) (summary judgment is not inappropriate in discrimination cases merely because they involve issues of intent and motive); *Hollander v. American Cyanamid Co.*, 172 F.3d 192, 193 (2d Cir. 1999) (summary judgment affirmed as no rational fact-finder could find discriminatory firing).

nation than Dew received upon his. *See* Pet. at 5. Contrary to Petitioner's claim, the Second Circuit did consider the evidence submitted by Dew; however, because the other individuals identified by Dew had not been terminated as part of the RIF, the Court concluded that they were not similarly situated to Dew for purposes of making comparisons. *See* Pet. at A11 ("[a]s the District Court found, however, Dew was unable to identify any similarly-situated employees who received severance pay in accordance with a different formula than he"). In so holding, the Second Circuit applied its well-settled standards for determining whether employees are similarly situated. *See, e.g., Shumway v. United Parcel Service, Inc.*, 118 F.3d 60, 64 (2d Cir. 1997) (for comparisons to be probative of discrimination, employees must be similarly situated in all material respects). Because Dew failed to present any other evidence to support this claim, the Second Circuit correctly concluded based on the foregoing standard that Dew had failed to make out a *prima facie* case of disparate treatment.

Finally, Dew erroneously claims that the Court of Appeals failed to consider the selective statistical information he cited. *See* Pet. at 18 ("the Court of Appeals refused to consider other statistical evidence showing discriminatory intent . . . and thereby ignored the persuasive effect of Dew's statistical evidence"). Just as it analyzed Dew's evidence in support of his disparate treatment claim, the Second Circuit considered the statistical evidence Dew submitted. *See* Pet. at A9 ("Dew also contended that he was the only director laid off in the RIF, leaving only one African-American director in the medical department out of twenty, and that HIP's middle and upper management was predominantly white, giving rise to an inference of discrimination"). In affirming the grant of summary judgment, the Circuit Court

properly determined that this evidence, when viewed in light of all the evidence submitted,[6] did not create an inference of discrimination sufficient to survive summary judgment. *See, e.g.*, *Smith v. Xerox Corp.*, 196 F.3d 358, 365 (2d Cir. 1999) (to make out a prima facie case of discrimination, statistical data must be "sufficiently substantial" to show that terminated employees' membership in a protected group caused the exclusion of their jobs) (*citing Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988).[7]

Moreover, as noted above, none of these claimed errors present "compelling" circumstances warranting this Court's review. At most, these claimed errors constitute "erroneous factual findings or the misapplication of a properly stated rule of law"; no important jurisprudential purpose is served by grating the Writ to review these evidentiary issues. Sup. Ct. R. 10.

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[6] In particular, the Court noted that 40% of HIP's workforce were African-American; that Dew was the only African-American employee terminated from a position of Director or higher; and that there were still five African-American Directors, in addition to Respondent Watson, the Chairman and CEO. *See* Pet. at A4.

[7] Also relying on *Watson*, the Second Circuit in *Smith* recognized that the probative value of statistical evidence must be determined on a case-by-case basis. *See* 196 F.3d at 366 (statistics' "usefulness depends on all of the surrounding facts and circumstances") (citations omitted). As the Second Circuit correctly held below, Dew's selective statistical data is not probative of discrimination in light of all the facts of circumstances presented here.

II.

THE WRIT SHOULD BE DENIED BECAUSE THE OPINION BELOW DOES NOT PRESENT ANY NOVEL LEGAL ISSUES OR ANY OTHER IMPORTANT REASONS FOR THIS COURT'S REVIEW

Dew's Petition does not raise any significant legal issues for determination by this Court. As explained, *supra*, and contrary to Petitioner's suggestion otherwise, the Second Circuit's opinion did not set a new standard governing discrimination claims brought under Section 1981. That decision merely reiterated and applied well-settled rules pertaining to the parties' respective burdens on a motion for summary judgment in a Section 1981 race discrimination case. Nothing in that decision presents an issue of concern for this Court.

A. The Second Circuit Decision Is A Summary Order Which May Not Be Relied Upon As Authority

The Second Circuit, by designating its unanimous affirmance as a "summary order," demonstrated its belief that "no jurisprudential purpose would be served by a written opinion . . ." Rules of the United States Court of Appeals for the Second Circuit, § 0.23. Thus, the decision may not be cited or otherwise relied upon by any person in any court.

Because the Second Circuit's decision has no "jurisprudential purpose" and may not be cited as authority, there can be no adverse consequences from that decision and it cannot be relied on to even suggest the Second Circuit's departure from the well-settled *McDonnell-Douglas* analysis. No purpose is therefore served by this Court's review of that decision.

B. The Decision Below Does Not Present Any Other Significant Issue Requiring This Court's Review

In addition to challenging the Second Circuit's analysis of the evidence Dew introduced in an attempt to survive summary judgment, Petitioner contends that *certiorari* is warranted in this case for this Court to determine whether an at-will employee may assert a claim under Section 1981. *See* Pet. at 9-10. Dew's reliance on this issue as a means of obtaining further review is surprising given that the District decided the issue in Dew's favor and the Circuit Court assumed, without deciding, that Dew had standing under Section 1981. *See* Pet. at A24 [District Court Opinion] ("[t]his Court holds that an at-will employee may maintain a cause of action under § 1981 where that claim is premised upon discriminatory discharge"); *id.* at A7 [Second Circuit Opinion] ("[w]e need not decide this issue, however, because assuming *arguendo* that Dew is protected by § 1981, he has failed to allege facts sufficient to withstand a motion for summary judgment").[8] Thus, review of this issue is not warranted in this case in which the Second Circuit explicitly declined to resolve this question, finding Dew's appeal meritless on other grounds.

Indeed, earlier this year, this Court denied *certiorari* in *Perry v. Woodward*, 199 F.3d 1126 (10th Cir. 1999), *cert. denied*, __ U.S. __, 120 S.Ct. 1964 (May 15, 2000), in which the Tenth Circuit concluded that an at-will employee may sue for discriminatory discharge under § 1981. Surely the facts of this case, in which the Second Circuit did not even reach this issue, do not present a more compelling reason for this Court's review.

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[8] Just last month, the Second Circuit resolved this question as anticipated by the District Court in this case, squarely holding that an at-will employee may sue under § 1981. *Lauture v. International Business Machines Corp.*, __ F.3d __, 2000 WL 791769 (2d Cir. June 20, 2000).

CONCLUSION

Two courts have independently reviewed and rejected plaintiff's claim of discrimination under the familiar *McDonnell-Douglas* burden-shifting analysis. The Petition simply does not demonstrate any compelling reason for this Court to grant the extraordinary remedy of *certiorari*. Accordingly, Respondents respectfully submit that the Writ should be denied.

Respectfully submitted,

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